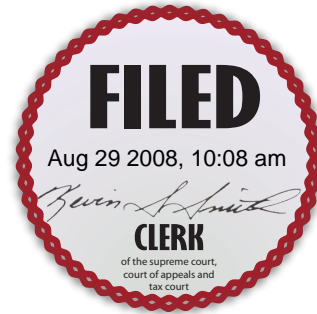


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHARLES WAGNER,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 49A02-0801-CR-63

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APPEAL FROM MARION SUPERIOR COURT  
The Honorable Rebekah F. Pierson-Treacy  
Cause No.49F19-0710-CM-223797

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August 29, 2008

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Following a bench trial, Charles Wagner was convicted of battery, a Class A misdemeanor. Wagner appeals, contending there is insufficient evidence to support his conviction. Concluding that the evidence is sufficient to support his conviction, we affirm.

### Facts and Procedural History

The evidence most favorable to the judgment establishes that on October 21, 2007, Jonathan Blythe, Tim Callihan, Jonathan Hickey, and Amanda Johnson were talking in the driveway of the home rented by Callihan and Johnson. Around 3:45 a.m., a group of six individuals made up of Wagner, Bryan Elliot, Jerry Wagner, Kevin Hegewald, Charles Hegewald and Darin Arterbery walked over to the driveway from the street. A confrontation had occurred earlier that night between Blythe and Elliot. Initially, Arterbery asked Callihan about a boat that Callihan had for sale. At some point Blythe asked Elliot why he had brought the group of individuals over to Callihan's house. Next, Wagner, K. Hegewald and C. Hegewald tackled Blythe on the gravel driveway and began hitting him. Blythe experienced physical pain and sustained injuries to his wrist, knees, forehead, and face. Following the fight, Callihan called the police. An investigating officer arrived at the scene and later arrested Wagner.

Wagner presented testimony from two witnesses that Blythe instigated the fight by pushing Elliot and/or hitting C. Hegewald and that Wagner intervened to defend Elliot and/or C. Hegewald. Wagner's evidence also indicated that Blythe tackled Wagner and

began to choke him. In closing arguments, Wagner claimed that he acted in defense of a third person as an affirmative defense to the battery charge.

### Discussion and Decision

Wagner argues in his appeal that the State presented insufficient evidence to establish the elements of battery or to rebut his affirmative defense of defense of a third person and thus his conviction should be overturned. We disagree.

#### I. Standard of Review

In reviewing sufficiency of the evidence claims:

[we] must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. [T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations and quotations omitted) (emphasis in original). Where contradictory or inconsistent testimony is presented at trial, it is up to the trier of fact to resolve such conflicting testimony. Brown v. State, 830 N.E.2d 956, 968 (Ind. Ct. App. 2005).

## II. Defense of a Third Person

To sustain a conviction of Class A misdemeanor battery, the State must prove beyond a reasonable doubt that Wagner knowingly or intentionally touched another person in a rude, insolent or angry manner and that the touching resulted in bodily injury to any other person. Ind. Code § 35-42-2-1(a)(1)(A). Bodily injury means “any impairment of physical condition, including physical pain.” Ind. Code § 35-41-1-4.

All eyewitnesses, whether called by the State or by Wagner, testified that Wagner intentionally touched Blythe in the course of the fight. Several witnesses testified at trial that Wagner “jumped” or tackled Blythe, forced him down to the gravel driveway, and repeatedly hit him. Several witnesses including the investigating officer testified to the injuries sustained by Blythe. As a result, sufficient evidence supports a finding that the State proved the elements of Class A misdemeanor battery beyond a reasonable doubt. Wagner argues that the State presented insufficient evidence to rebut his affirmative defense of defense of a third person.

A person is justified in using reasonable force against another person to protect a third person from what he reasonably believes to be the imminent use of unlawful force. Ind. Code § 35-41-3-2(a). No person shall be placed in legal jeopardy of any kind whatsoever for protecting a third person by reasonable means necessary. Id. To prevail upon a claim of defense of a third person, a defendant must show that he (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear that unlawful force would be used against a

third person. See Ind. Code § 35-41-3-2(e)(3); see also Wilcher v. State, 771 N.E.2d 113, 116 (Ind. Ct. App. 2002).

Once a defendant claims defense of a third person, the State bears the burden to disprove the defense beyond a reasonable doubt. Mullen v. State, 421 N.E.2d 731, 732 (Ind. Ct. App. 1981). The burden need not be met only by rebuttal, but may be met by an affirmative showing in the State's case in chief. Id. at 733. The trier of fact must consider the situation from the defendant's viewpoint, but this does not mean that the trier must believe the defendant's evidence. Id. Further, whether the State has presented sufficient evidence to rebut the claim of defense of a third person is a question of fact to be determined by the trier. Id.

The trial court heard and considered conflicting views of the events based on the testimony of witnesses presented by the State and by Wagner. The State's witnesses testified that Blythe did not provoke Wagner's response nor did he instigate physical contact. In response, Wagner presented two witnesses who testified that Blythe either pushed Elliot or hit C. Hegewald, or both, and that Wagner tackled Blythe in defense of his friends. One of Wagner's witnesses also testified that Blythe punched Wagner in the head, pinned him to the ground and choked him.

It is the fact finder's, and not this court's, responsibility to determine whom to believe or disbelieve. See Brown, 830 N.E.2d at 968. In this case, the fact finder chose to believe the State's witnesses over Wagner's and we will not second-guess that choice. The testimony presented by the State establishes that Wagner instigated the physical contact and Blythe's injuries coupled with Wagner's apparent lack of injuries support this

view. A finding that Wagner was the initial aggressor in the attack successfully rebuts his affirmative defense and the evidence most favorable to the judgment sufficiently supports such a finding.

### Conclusion

The evidence most favorable to the judgment is sufficient to support Wagner's conviction for Class A misdemeanor battery.

Affirmed.

NAJAM, J., and MAY, J., concur.